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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re K.S., a Person Coming Under the
Juvenile Court Law.

B214568
(Los Angeles County
Super. Ct. No. CK 757722)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

J.K.,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County, D. Zeke Ziedler, Judge. Affirmed.

Linda Rehm, under appointment by the Court of Appeal, for Defendant and Appellant.

Robert E. Kalunian, Acting County Counsel, James M. Owens, Assistant County Counsel, and Denise M. Hippach, Associate County Counsel, for Plaintiff and Respondent.

* * * * *

Mother appeals dispositional orders of the juvenile court directing her to participate in random, weekly drug testing and participate in a rehabilitation program if she had any missed or dirty tests. Mother contends there is insufficient evidence to support the court's orders. We hold that mother forfeited the issue and, in any case, the trial court did not abuse its discretion in its disposition orders as to mother. We therefore affirm.

FACTS AND PROCEDURAL HISTORY

Mother's 14-year-old son had a troubled history, including psychiatric holds and juvenile arrests. Father had no involvement in the minor's life until the child was 9 years old, when father petitioned the court for custody. Both parents had a loving but conflicted relationship with the child. During the parents' lengthy dispute over custody, the minor began to display significant problems, resulting in explosive outbursts in both homes.

Late in the evening in December 2008, the minor called the Glendale police claiming mother had struck him with the ear buds and wire from a portable electronic device leaving welts above the minor's eye and on his forehead and upper back. A responding officer reported mother appeared to be intoxicated, and she admitted to having a glass of wine. The minor told the officer mother used marijuana. The officer investigated the home and found no marijuana.

The arresting officer stated he could not interview mother at first due to her intoxication. After a couple of hours, mother made a statement that she had never hit her child and did not know how he received the marks.

An emergency response referral social worker interviewed the minor, who stated he had an argument with his mother after she told him to turn off his computer. He said this was the first time an incident like this occurred, and he believed it was because mother was drunk and under the influence of illegal drugs. The minor told the social worker he knew mother used marijuana. The social worker observed a welt about the child's eye and on his forehead. She interviewed mother, who denied hitting her child and said she did not know how he got the marks. Mother stated her son should be placed

in a group home and declined to state whether she was under the influence of illegal drugs. The worker observed that mother appeared to be still under the influence of alcohol or drugs.

The minor was detained after mother was arrested and father failed to arrive at the police station.

The Los Angeles County Department of Children and Family Services (Department) filed a Welfare and Institutions Code section 300 petition on the child's behalf.¹ The family had seven prior referrals with the Department from 2000 to 2007, nearly all of which were returned unfounded.²

The original petition, dated December 23, 2008, alleged the child was at risk of serious physical harm because mother had repeatedly struck him with ear buds attached to an electrical cord, inflicting contusions to the child's eye, forehead and back, was arrested for child abuse and had a criminal conviction for willful cruelty to a child. (§ 300, subd. (a).) The petition also alleged that the parents failed to protect the child and that father had failed to provide for the child. (§ 300, subds. (b), (g).)

The juvenile court ordered the minor detained and released him to father.

The Department's subsequent jurisdiction and disposition report to the juvenile court indicated the minor denied his mother intentionally struck him with the headphones. He now asserted he had thrown down his headphones and mother, who was "a little tipsy," accidentally hit him on the forehead and back when she picked them up and twirled them around her head "like a rock in a sling." The minor disclosed that mother had "nerve damage" to the side of her face that caused her pain and she had a doctor's prescription for marijuana. He said she only used marijuana when he was at father's home. The minor recounted that mother had a problem with alcohol when he

¹ All further statutory references are to the Welfare and Institutions Code.

² An allegation against mother in May 2008 was found to be substantiated, and the Department had provided her voluntary family maintenance services ending in early December 2008.

was six or seven, when several times he saw her passed out in her own vomit. He did not think she had a current problem, although occasionally she got “a little tipsy.” Mother admitted she had a prior problem with alcohol but stated she had stopped drinking entirely for a period after her DUI (driving under the influence) conviction in 2004 and now only drank on occasion. As to her marijuana use, mother stated she suffered from pain due to trigeminal neuralgia and used to visit the emergency room twice a year when it flared up. She was prescribed marijuana two years before, after other treatments were unsuccessful. She stated she used marijuana in the evening but did not use it around or in front of her son.

The social worker reported that the frequency of mother’s marijuana use depended on her pain -- at times, mother might go several months without using it, but at other times she had to use it daily for up to two weeks. Mother did not provide the Department with any documentation of her physical condition or her prescription for medical marijuana. The Department indicated it was difficult to determine the extent of mother’s substance abuse or how it might affect her current parenting.

The Department reported the minor to be highly intelligent, very personable and charming; he had excellent grades, was developmentally on target and loved to skateboard and play the guitar. He loved both parents and knew both parents loved him. Both parents were employed, had nice homes and were cooperative. Each parent had accepted some personal responsibility for the circumstances, and each clearly loved the child. The parents indicated a willingness to place their differences aside to work toward coparenting their child.

However, the minor has had six psychiatric hospitalizations in the last five years, and he also has had regular outbursts of anger that often ended with police involvement. His behaviors were out of control in both parents’ homes, and he has been hospitalized while in each parent’s home. The Department recommended placement in a structured and therapeutic setting. The Department reported it was not only unsafe for the minor to be in mother’s and father’s homes, it was unsafe for both parents for the minor to be in either home.

At the jurisdictional and dispositional hearing on January 27, 2009, the Department filed an amended petition containing an allegation pertaining to the minor's mental health condition and the inability of the parents to safely or effectively manage his behavioral and emotional problems. (§ 300, subd. (b).) Father submitted on the basis of the social worker's report and mother pled no contest. The juvenile court asserted jurisdiction over the minor, finding the parents' inability to manage his behavioral and emotional problems created a detrimental home environment, placing the child at risk of physical and emotional harm and abuse. The court dismissed the remaining allegations of the amended petition without prejudice at the request of the Department. The court gave the Department discretion to limit or discontinue mother's drug and alcohol testing.

The court ordered individual counseling and psychiatric chemical testing for the minor, and it ordered the Department to refer the minor to a psychiatrist. It also directed the Department to attempt to place the minor at a therapeutic facility as soon as possible. Both parents received reunification services with monitored visitation. Father was ordered to enroll in conjoint counseling with the minor and mother and individual counseling. Mother was also ordered to enroll in individual counseling. She was further ordered to submit to "weekly and on demand drug and alcohol testing," and she was ordered to do a full drug and alcohol program if she had any missed or dirty tests.

Mother appealed the disposition order regarding drug testing.

STANDARD OF REVIEW

This court reviews the juvenile court's orders for the reunification plan for abuse of discretion, and we will not reverse the court's determination absent a clear abuse of discretion. (*In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1006.) The test for abuse of discretion is whether the trial court exceeded the bounds of reason. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

It is the trial court's function to assess the credibility of the various witnesses and to weigh the evidence to resolve the conflicts in the evidence. As a reviewing court, we have no power to assess the effect or value of the evidence, to weigh the evidence, to consider the credibility of witnesses or to resolve conflicts in the evidence or the

reasonable inferences that may be drawn from the evidence. Under the substantial evidence rule, we must accept the evidence most favorable to the trial court's order as true and disregard the unfavorable evidence as having insufficient verity to be accepted by the trier of fact. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.)

DISCUSSION

1. Forfeiture

After sustaining the allegation regarding the parents' inability to effectively manage the minor, the juvenile court invited the parties to be heard on the disposition. Mother's counsel asked to be heard, saying "we have two little issues Mother does travel because of business" Counsel represented to the court that "[mother's] willing to test." Counsel informed the court she suggested mother call the social worker whenever mother went out of town, so "if her letter comes up, the worker will have it in the record that she is not here" Counsel further stated mother had a long-standing chronic condition that required her to take marijuana when it recurred and mother had a doctor's letter prescribing medical marijuana. Counsel represented that mother tried to do without the marijuana, but she sometimes needed to take it when her condition became "really bad." Counsel stated that, should that occur, she suggested to mother to bring the letter with her to testing as marijuana stays in the system for at least 30 days. After so advising the court, mother's counsel submitted.

After all parties had an opportunity to argue, the juvenile court issued the dispositional order that mother undergo drug testing and a further order that mother do a full drug and alcohol program if she has any missed or dirty tests. The court found that "mother has a history of alcohol abuse, driving under the influence and arrests," noting her history of alcohol abuse caused the court concern about ongoing marijuana use, "whether prescribed or not," and the "effect it would have on her ability to parent and on putting any sobriety at risk."

Later, at the end of the hearing, mother's counsel indicated she had a question about the medical marijuana, saying, "I want to get it straight." The court referred to a recently decided appellate opinion inferring a legislative intent that risk to children

remains an issue even when a parent has a medical prescription for marijuana. The court reiterated in light of mother's "history of substance abuse in the form of alcohol," including arrests, it was ordering mother to refrain from consumption of alcohol as it had concerns about the implications for any marijuana use. The court stated that even if the marijuana might be prescribed, "if it gets in the way of any parenting ability, then it's an issue. So I have ordered her to submit to weekly and on demand random drug and alcohol testing[,] and . . . if she has any dirty tests, she needs to do a drug and . . . alcohol rehabilitation program with weekly random testing."

The Department contends that mother "waived" her right to contest the dispositional order by not objecting below. On reviewing the record, we agree the contention was forfeited.

A reviewing court normally will not consider a challenge to a ruling if an objection could have been but was not made in the trial court. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) The purpose of the rule is to encourage parties to bring errors to the attention of the trial court so they may be corrected. (*Ibid.*) Any other rule would allow a party to deliberately stand by in silence and permit the proceedings to reach a conclusion that the party could accept if favorable and challenge if unfavorable. (*In re Dakota S.* (2000) 85 Cal.App.4th 494, 502.) "[I]t is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected at the trial." [Citation.] (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 185, fn. 1, italics added by *Doers.*)

As the Department notes, mother's counsel twice indicated to the juvenile court that mother was amenable to testing. At the first detention hearing, mother's counsel represented to the juvenile court that mother was willing to test.³ At the same hearing, the minor's counsel indicated her main concern was drug or alcohol abuse, and she asked

³ Counsel told the court: "mother is willing to test to show [she was only] drinking socially, she is willing to cut that off and willing to test right now. [¶] [T]he medical marijuana, she said she has not been using for a while, so if [the] court was to test her she does have her . . . medical marijuana card."

the court to address the possibility of a return to mother at the pretrial resolution conference only “if she has been testing clean.” The court thus ordered the Department to refer mother to weekly and on demand random drug and alcohol testing at that hearing.

At the subsequent jurisdictional and dispositional hearing, mother’s counsel again informed the court that “[mother’s] willing to test.” Counsel suggested a procedure under which mother would call the social worker whenever mother went out of town so there could be a record in case she was traveling and not available for testing. When the court invited the parties to be heard on the disposition, mother’s counsel referred solely to “two little issues” concerning the details of the testing -- mother’s having to miss tests because of business trips out of town and the possibility of mother bringing her doctor’s letter to the testing in case she had to use marijuana for her medical condition. Mother, however, did not raise any objection to the requirement for testing itself. Had mother voiced a clear objection, the juvenile court would have had the opportunity to address the issue head on and perhaps may have reconsidered the plan for reunification. In this case, it would be unfair not only to the juvenile court but to the child, whose counsel had expressed concern over mother’s drug or alcohol abuse, to entertain mother’s belated objection to the testing requirement.

In any case, even assuming mother did not forfeit her right to object, the juvenile court did not abuse its discretion in issuing its dispositional order, as we discuss below.

2. No Abuse of Discretion

Mother contends insufficient evidence supports the juvenile court’s drug testing and contingent rehabilitation program requirement. The Department contends the juvenile court acted well within its discretion in ordering mother to undergo random weekly drug and alcohol testing given mother’s history of substance abuse. We find substantial evidence in the record to support a finding that the minor was at risk due to mother’s admitted ingestion of alcohol and marijuana, and therefore the court did not abuse its discretion in issuing its orders.

The social worker’s reports reflect that, in 2004, mother was arrested by the police for driving under the influence of alcohol, and the minor was in the car when the police

stopped mother. The arrest resulted in subsequent misdemeanor convictions for DUI and willful cruelty to a child. After the incident that triggered the present proceedings, the minor told the social worker he believed the reason mother hit him was because she was under the influence. When the investigating police officer sought to question mother about the incident, the officer smelled alcohol on mother's breath and observed that her eyes were bloodshot, watery and droopy, her coordination was poor, and her speech was mumbling and halting. Mother had trouble answering questions and could not at first respond to the officer's questioning regarding the events of the past evening. The social worker who interviewed mother in the early morning hours believed mother was under the influence of alcohol or drugs. Mother's convictions in the recent past, together with the circumstances of the incident in which the minor alleged he was struck by mother during an argument, his claim the argument was facilitated by mother's ingestion of alcohol, and the observations of the investigating officer and social worker that mother appeared to be under the influence support a reasonable inference mother had a current problem with substance abuse. Mother admittedly used medical marijuana and, although she denied using when the minor was present, the minor had reported otherwise.

Even if allegations regarding mother's substance abuse had been stricken without prejudice from the amended petition, the juvenile court had authority to fashion a dispositional order not limited to issues raised by its jurisdictional findings. (*In re Christopher H.*, *supra*, 50 Cal.App.4th 1001.) "[W]hen the court is aware of other deficiencies that impede the parent's ability to reunify with [her] child, the court may address them in the reunification plan." (*Id.* at pp. 1008.) As the court in *Christopher H.* explained, "Random drug or alcohol testing will facilitate appellant's compliance with the remainder of the reunification plan. The possibility of random drug tests should provide an added incentive for appellant to avoid illicit drugs and excessive alcohol consumption, either of which will interfere with his ability to provide a suitable home for [the child] and achieve reunification." (*Ibid.*) Given mother's past problems with substance abuse and the circumstances that triggered the present proceedings, the court here similarly and reasonably concluded mother's substance abuse was a potential

obstacle to a successful reunification. The minor's serious emotional and behavioral problems called for a "stable, sober caregiver." (*Id.* at p. 1007.) The juvenile court would have been remiss in failing to address all the problems that led to the minor's being taken from mother's custody, even if it found such allegations were insufficient to sustain jurisdiction.

In this respect, *In re Basilio T.* (1992) 4 Cal.App.4th 155 and *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322 are distinguishable. In *Basilio T.*, the case plan included a substance abuse component for the parents based upon little more than a social worker's observation of the mother behaving "somewhat out of the usual" and being obsessed with discussing a fortune-making invention. (*Basilio T.*, *supra*, at p. 172.) There was nothing in the record indicating the parents had any substance abuse problem or that a substance abuse problem led to the conditions causing the dependency. (*Id.* at pp. 172-173.) In *Jennifer A.*, the issue was whether the juvenile court properly terminated reunification services at the 18-month review based on mother's one positive and several missed drug tests during a six-month period. (*Jennifer A.*, *supra*, at p. 1340.) The appellate court reversed, noting there had been no evidence linking mother's marijuana and alcohol use to the condition that prompted the dependency proceeding, i.e., her lapse in judgment in leaving her children at home unattended, and the social worker had testified mother did not have any drug problem affecting her parenting skills. (*Id.* at p. 1346.) In this case, however, there was sufficient evidence linking mother's substance abuse to the circumstances leading to the dependency proceeding and a very real danger such abuse might raise an impediment to reunification.

Furthermore, even though mother denied using marijuana while the minor was at her home, the minor initially reported to the investigating police officer that he had seen mother use marijuana and had found marijuana and pipes in the house in the past. And, assuming mother could produce a prescription from the doctor for medical marijuana, as counsel represented to the court, even legal use of marijuana can present a risk of harm to a child. (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 452 [reasonable inference to be drawn from Legislature's prohibition against use of medical marijuana within defined

distance from schools and other like places is that the “use of marijuana near others can have a negative effect on them”].) In *Alexis E.*, Division Three recently stated, “We cannot fathom that the Legislature intended that negative effects on children from marijuana smoke would be unacceptable if it were being smoked outside the medical marijuana law, but acceptable if the person smoking the substance in their home were doing it legally.” (*Ibid.*)

Mother asserts the juvenile court is making mother “choose between both her employment and her pain treatment and reunifying with her son.” However, the dispositional order is not as Draconian as mother makes it out to be. The order gives the Department discretion to limit or discontinue mother’s drug and alcohol testing, and we trust the social worker will tailor such testing so as to make reasonable accommodation for mother’s need to travel for her employment. We also note mother’s counsel informed the court that mother had not used marijuana for about a year as she had switched to a different medication.

DISPOSITION

The orders are affirmed.

FLIER, Acting P. J.

We concur:

BIGELOW, J.

MOHR, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.